87-1402

Supreme Court, U.S.
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CASE NO.:

in the

Supreme Court

of the

United States

OCTOBER TERM, 1987

JAMES R. CLODFELTER,

Petitioner/Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent/Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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88 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the failure of the government to provide exculpatory grand jury testimony specifically requested by the defendant violated the standards for production of such materials established by this Court in *Brady v. Maryland*, 373 U.S. 83 (1963), *U.S. v. Agurs*, 427 U.S. 97 (1976), and related cases.

2. Whether the standard for conviction utilized by the Eleventh Circuit in upholding Petitioner's conviction conflicts with that of the Third Circuit as explicated in *United States v. Heithaus*, 391 F.2d 810 (3rd Cir. 1968).

LIST OF INTERESTED PARTIES

TRIAL JUDGE	Elizabeth A. Kovachevich
PETITIONER	James R. Clodfelter
UNITED STATES OF AMERICA	Warren A. Zimmerman Assistant United States Attorney
ATTORNEY FOR PETITIONER	Alvin E. Entin, Esq. Entin, Schwartz, Barbakoff & Schwartz
ALLEGED VICTIMS	Department of Housing and Urban Development
	Banco Mortgage Company

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UNITED STATES OF AMERICA,

Respondent/Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH JUDICIAL CIRCUIT

The Petitioner, JAMES R. CLODFELTER, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Judgment and Commitment Order of the District Court is reprinted herein.

(A 23). The Court of Appeals for the Eleventh Circuit affirmed the Judgment of the District Court in *United States v. Clodfelter*, 831 F.2d 1069 (11th Cir. 1987), but declined to issue an opinion. The Mandate of the Eleventh Circuit was issued on November 5, 1987 (A 52), but pursuant to Petitioner's Motion, it was withdrawn on November 25, 1987, and Petitioner was permitted to file his Petition for Rehearing out of time. (A 53). Petitioner's Motion for Rehearing was denied on December 10, 1987.

JURISDICTION

This Petition arose in the first instance from criminal charges filed in the District Court for the Middle District of Florida. The Judgment and Commitment Order rendered by the Court was appealed to the United States Court of Appeals for the Eleventh Circuit pursuant to the jurisdiction vested in the Court by 28 U.S.C. 1291.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitution of the United States, Amendment V

No person shall be shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. 1010

Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan

or advance of credit shall be offered to or accepted by the Department of Housing and Urban Development for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or for the purpose of influencing in any way the action of such Department, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition Below

The Petitioner, JAMES R. CLODFELTER, was named in six counts of a ten count indictment returned by the Federal Grand Jury sitting in Tampa, Florida, on January 9, 1986. (A 1-11). The gravamen of the indictment was that CLODFELTER and a Co-defendant, JAMES A. DeMERITTE, obtained financing from the Department of Housing and Urban Development (HUD) by fraudulently declaring that they intended to live in houses they purchased, when, in actuality, they purchased them for speculation.[1]

[1]DeMERITTE pleaded guilty to one count of the indictment prior to trial.

Counts one, two, and three charged CLODFELTER with violating Title 18 U.S.C. Section 1341 and Section 2 by mailing false documents for the purpose of defrauding HUD.

Counts five, six, and seven charged him with making false statements in various documents utilized to obtain loans to purchase the properties. (A 1-11).

On January 23, 1986, the Petitioner was arraigned and entered a plea of not guilty to the charges.

On February 11, 1986, trial counsel for Mr. CLODFELTER filed a motion to compel the government to disclose all evidence favorable to the Petitioner. (A 12-15). The motion specifically requested any evidence favorable to Petitioner contained in:

> 5. The transcript of the testimony given before the Grand jury during its investigation and consideration of the subject matter of this cause by persons who:
>
> a) the government intends to call at trial; and
>
> b) the government does not intend to call at trial. (A 14).

Furthermore, in the Report and Order on Omnibus Hearing Project filed with the Court on January 27, 1986, the government was ordered to furnish such favorable evidence to Petitioner, but the government indicated that it had no such evidence. (A 16-21).

Contrary to the government's representations, and in opposition to the Court's Order, the government possessed the grand jury testimony of Alfred Giamanco, an employee of the International Gold Bullion Exchange (IGBE) which corroborated the Petitioner's testimony, and contradicted testimony elicited from government witnesses in several critical areas. In addition, the transcript revealed the existence of witnesses possessing other information which would have been exculpatory. The government never revealed the existence of this critical testimony until after Petitioner's trial.

The trial of Petitioner's case began with jury selection on September 8, and concluded on September 18, 1986. The jury returned verdicts of "not guilty" on counts one, two, three, and five of the Indictment, and of "guilty" on counts six and seven. Thereafter, the trial court entered its judgment consistent with the verdicts. (A 22, 23).

Subsequent to the conclusion of the trial, Petitioner discovered that the grand jury testimony of Alfred Giamanco was exculpatory, rather than inculpatory, and filed a Motion for New Trial and a Memorandum in Support of Motion for New Trial. (A 24-25). The motion was based on the *Brady* violations referred to herein, and on sufficiency of the evidence. The motion was denied on January 14, 1987. (A 46-47). Petitioner's Motion for Rehearing was filed on January 23, 1987 (A 48), and denied on January 29. (A 49-50). On January 23, Petitioner was sentenced to a term of two years incarceration, of which eighteen months was suspended. Petitioner was also required to serve two years probation, and was fined $2,500.00. (A 23). He is currently on bond.

Petitioner filed a timely Notice of Appeal to the Court of Appeals for the Eleventh Judicial Circuit on January 23. (A 51). The Eleventh Circuit affirmed his conviction (without opinion) on Counts Six and Seven of the Indictment in *United States v. Clodfelter*, 831 F.2d 1069 (11th Cir. 1987).

ii **Statement of Facts**

The Petitioner purchased one of two homes built in Hudson, Florida, by Southfork Properties, Inc., a corporation in which he owned a 50% interest with a James DeMeritte. It was originally decided in December, 1981 that the Petitioner would purchase one home, and DeMeritte the other, basically allowing for the liquidation of the corporation. The original contracts called for an 80% or non-owner occupied loan.

In February of 1982, Mr. CLODFELTER and his wife decided to dissolve their marriage. Simultaneously, Petitioner also decided to dissolve his law partnership with John Bonner, the Petitioner's father-in-law. A contract to purchase the home was submitted to Banco Mortgage Corporation on or about March 1, 1982.

Prior to this time, the Petitioner had formed his own Professional Association to open a single-practitioner law practice and had moved out of the home at 2162 Waterside Drive in Clearwater, Florida, which he had shared with his wife. Petitioner later entered into a property settlement agreement whereby his wife would retain all right, title and interest in that home and all of the furnishings therein, upon dissolution of their marriage in July of 1982.

Upon moving from the home on Waterside Drive, and prior to submitting the FHA loan papers, Petitioner moved into a fully furnished, rented townhome in Indian Rocks Beach, Florida, occupied by a friend by the name of Robert Vanderbrink. The premises had been leased by Vanderbrink until June 1, 1982, when he was to move into another residence with his fiancee.

Petitioner thus had a rent-free townhome to occupy until June 1, 1982, the anticipated time of the closing on his home.

Furthermore, on March 4, 1982, Petitioner accepted part time employment with the International Gold Bullion Exchange in Fort Lauderdale, Florida at the rate of $1,000.00 per week. Initially, Petitioner did not have an office or a secretary in Fort Lauderdale, and he commuted back and forth from the West coast to the East coast when business necessitated. While he was receiving compensation for the part time work he was performing for the Fort Lauderdale company, Petitioner was winding up the cases he was working on for his old law firm and also working ~~on his~~ own law practice in the Pinellas/Pasco area.

When it became evident that the Petitioner and his wife were not going to reconcile, and that he would need a home to live in when he was practicing law on the West coast, Petitioner changed his contract from non-owner occupied to owner occupied with regard to the financing that he would be seeking. In accordance with his intentions, at the end of April, 1982, the Petitioner purchased a complete set of furniture for the home he was buying, and placed it in storage for delivery at the

end of May, 1982, when the lease on the furnished Indian Rocks Beach townhome was to expire, and after the new home would be transferred to his name from Southfork Properties.

On or about May 1, 1982, Petitioner signed an agreement to rent a fully furnished home on the East coast in Boca Raton, for which his employer had agreed to pay the rent in lieu of paying for the Defendant's hotel bills when he was in the area on company business. The rental on this furnished home was the equivalent of 4 to 5 days stay at the hotel where out-of-town employees were put up by the company; and since the Fort Lauderdale employment called for Petitioner to be on the East coast at least 4 to 5 days a month, the rental on the furnished home was cost effective for the Petitioner's employer.

On May 1, 1982 Petitioner vacated his old law firm address at 613 S. Myrtle and moved into his new office at 300 Turner Street in Clearwater, Florida, taking all of his office furniture, files and personal blongings to the new address. Immediately thereafter, he had telephone lines installed and stationery and business cards printed (at a substantial cost), since he intended to spend one-half of his time in the private practice of law on the West coast. On May 24, 1982, Petitioner returned from a week long business trip and attended the closing on his new home. It was at this closing that the Petitioner signed the two FHA forms indicating his intent to occupy the home, which were the basis for the convictions for signing a false statement to induce a FHA or HUD insured loan. At that time, it was indeed the Petitioner's express intention to occupy the home,

and he had made plans to move his personal belongings from the Indian Rocks Beach townhome, and to have his newly purchased furniture delivered to the new home so he could occupy it.

Upon returning to Fort Lauderdale the day of his closing, the Petitioner was informed that his services were needed in Fort Lauderdale on a full time basis, and that he would have to give up his private practice on the West Coast and relocate to the Fort Lauderdale area full time. It was agreed that Petitioner would be given a substantial raise, an expense allowance, and a company credit card for his personal and business use. Defendant's employer also agreed to purchase the Defendant's new home as part of his relocation package. All of these discussions and agreements took place before the Petitioner returned to the West coast after the May 24, 1982 closing, before he returned to move from the Indian Rocks Beach residence and before he could occupy the new home.

As far as the Petitioner knew, only William Alderdice, his boss at IGBE, and Alfred Giamanco, the witness whose grand jury testimony was withheld from the Petitioner, were involved in the conversations wherein it was decided to retain him on a full-time basis. It was not until receiving the government's sentencing memorandum on October 1, 1986, *after* Petitioner's trial, that it was discovered that the transcripts reflected the existence of other potential witnesses for the defense, who were present during those critical meetings, and that the transcripts of Giamanco's grand jury testimony

of December 18, 1984, and January 15, 1985 were exculpatory.[2]

After his agreement to move to the East coast on a full-time basis, Petitioner then returned to the West coast on several occasions during June and July of 1982 to gather his personal belongings and to close his law practice there by transferring his files and clients to Attorney Douglas Menchise. This was substantially accomplished by July 3, 1982, when Petitioner had all of his belongings and the new furniture he purchased for the new home transported by moving van to the furnished residence he had rented in Boca Raton.

Upon his relocation to the Fort Lauderdale area, and the closing by Defendant's employer on the Defendant's home on July 8, 1982, Petitioner changed from part-time to full-time employment status, and pursuant to his relocation and salary arrangement, Petitioner began paying his own rent on the home in which he was staying in Boca Raton. The Petitioner fully intended to live in the house he purchased through HUD in Hudson, Florida, at the time he signed the closing documents; only later events altered that intent.

REASONS FOR GRANTING THE WRIT

(i) Conflict with *Brady* and *Agurs*

In affirming the trial court without opinion, the Eleventh Circuit has rendered a decision which

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[2]Specifically, the witnesses, both of whom were involved in the process to get CLODFELTER converted to a full-time employee of IGBE, were John Compton and Wayne Hamby. See, for example, the affidavit attached to Petitioner's Motion for a New Trial. (A 45-46).

materially conflicts with *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976).

In effect, the Eleventh Circuit has ruled that the government can withhold material evidence exculpatory to a criminal defendant when it is specifically requested by the defendant.

There is little conflict over the proposition that the grand jury testimony was requested by the defense. As noted on pages 5-6 of this Petition, the request was made in a variety of pleadings. The contention of the government that the requests were not specific enough is without merit.

In *Bagley v. Lumpkin*, 719 F.2d 1462 (9th Cir. 1983), the defendant filed a pretrial motion requesting that the government reveal, pursuant to *Brady*, "whether the Government paid or promised compensation to any of its witnesses or informants." The Ninth Circuit, in a decision which at least facially conflicts with the Eleventh Circuit's affirmance of Petitioner's conviction, considered this request to be "specific" under *Agurs, supra.*[3]

Since only eight witnesses testified before the grand jury, the importance of Giamanco's testimony could hardly have been lost on the government. Their failure to call him as a witness speaks eloquently of the government's knowledge. His testimony could hardly

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[3]*Bagley*, was reversed by this court in *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985). But this court also considered the request to be specific. 87 L.Ed. 2d at 488.

have been more crucial to the Petitioner. The government's denial of having information in its possession "favorable to the Defendant on the issue of guilt" was simply false.

The government argued that the Petitioner's claim for relief should be denied because he knew that Giamanco testified before the grand jury. But this ignores the fact that, because of the secrecy in which we shield grand jury testimony, the Petitioner was unaware of the *nature* of the testimony. One need not speculate what the result would have been had the Petitioner tried to pierce the veil of secrecy surrounding grand jury testimony. It is the government which controls the flow of that information. Its release must not be determined by whether or not its release enhances the possibilities for conviction.

The government had listed Giamanco on its list of witnesses, but declined to call him, thus avoiding production of the transcript pursuant to the Jencks Act. In addition, the appearance of Giamanco's name on the government list of witnesses fooled trial counsel into believing that Giamanco's testimony was not material, or favorable.

In its Order denying CLODFELTER's second Motion for New Trial,[4] the trial court stated:

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[4]The Petitioner's first Motion for New Trial was denied without benefit of a written order.

> Upon due consideration, it is hereby the finding of this Court that there is no reasonable probability that the result of the trial in this case would have been affected by pretrial disclosure or the aforementioned transcript of Alfred Giamanco.

The standard relied upon by the trial court, and affirmed by the Eleventh Circuit was incorrect, and denied Petitioner the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. It would have been correct if there had been no specific request for the transcripts.[5] However, as this Court said in *Agurs* (at 49 L.Ed 2d 351):

> The test of materiality in a case like Brady in which specific information has been requested by the defense is not necessarily the same as in a case in which no such request has been made.
>
> * * *
>
> In *Brady*, the request was specific. It gave the prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by

[5]See, *Agurs, supra.*, at 49 L.Ed. 2d 354-355.

> the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. *When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.*[6]

At note 13, 49 L.Ed. 2d 351, the Court went on to say:

"The petitioner was denied due process of law by the State's suppression of evidence before his trial began. The proceeding must commence again from the stage at which the petitioner was overreached. The denial of due process of law vitiated the verdict and the sentence. *Rogers v. Richmond*, 365 U.S. 545, [5 L.Ed. 2d 760, 81 S.Ct. 735]. The verdict is not saved because other competent evidence would support it. *Culombe v. Connecticut*, 367 U.S. 568, 621, [6 L.Ed. 2d 1037, 81 S.Ct. 1860]." Brief for Petitioner in *Brady v. Maryland*, No. 490, OT 1962, p 6.

(ii) **Conflict with *United States v. Heithaus***

United States v. Heithaus, 391 F.2d 810 (3d Cir. 1968), was a case greatly similar to the case instanter. In *Heithaus*, three Defendants were convicted in a joint trial wherein they were charged with making false

[6]Emphasis added.

statements in order to obtain HUD loans. The indictment outlined a scheme in which one of the defendants would solicit the business of would-be applicants for home loans, the applicant would then be referred to another defendant who would take down basic financial information, and finally, that *false* information, which varied radically from that given by the applicant, would be sent to an attorney who filled out the applications and submitted them.

The Court found that, although Heithaus was receiving inordinately large amounts of money for the service, was a principle in the company taking down the information from the applicants and submitting false information to the attorney, had knowledge of the procedure under which his business partner obtained the signatures of borrowers on blank loan applications and forwarded them to the attorney for completion and submission to the lending institutions, and that Heithaus admitted making contacts with lending institutions and obtained credit reports on prospective borrowers, the suspicions thus raised fell short of proof beyond a reasonable doubt.

In the instant case, the main issue to be decided by the jury was whether, at the time CLODFELTER signed the application for the BANCO loan, he knowingly made, passed, uttered, or published a false statement, to wit: that he intended to live in the house in Hudson, Florida. But at best, as in *Heithaus, supra.*, the evidence raises a mere suspicion that he knew the statements to be false at the time they were made, and intended HUD to rely on them. Thus the standard evinced by the Eleventh Circuit in affirming Petitioner's conviction differs materially from that of the Third Circuit in *Heithaus.*

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

ALVIN E. ENTIN, ESQ.
ENTIN, SCHWARTZ,
BARBAKOFF & SCHWARTZ
2450 N.E. Miami Gardens Drive
(305) 932-0550

PROOF OF SERVICE

COMES NOW, Alvin E. Entin, Esq., on behalf of the Petitioner, JAMES R. CLODFELTER, and states to this Court:

1) That on February , 1988, the attached Writ of Certiorari submitted on behalf of the Petitioner, was mailed at the United States Post Office, Miami, Florida.

2) I certify that a true and accurate copy of the foregoing Writ of Certiorari has been furnished to Warren Zimmerman, Assistant United States Attorney, 500 Zack Street, Tampa, Florida 33062.

3) Said statement is being submitted to this Court pursuant to Rule 28.2 of the Rules of the Supreme Court.

Respectfully submitted,

ENTIN, SCHWARTZ,
BARBAKOFF & SCHWARTZ
2450 N.E. MIAMI GARDENS DRIVE
SECOND FLOOR
MIAMI, FLORIDA 33180
(305) 932-0550

ALVIN E. ENTIN, ESQ.

SWORN TO AND SUBSCRIBED before me this day of February, 1988.

NOTARY PUBLIC,
STATE OF FLORIDA

Appendix

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 86- -Cr-T-

UNITED STATES OF AMERICA

v.

JAMES R. CLODFELTER and
JAMES A. DeMERITTE

INDICTMENT

The Grand Jury charges:

Count One

A. Introduction

1. At times material herein, James R. Clodfelter and James A. DeMeritte, the defendants, were co-owners and officers of Southfork Properties, Inc. (hereinafter "Southfork"), which developed and owned houses at 102 and 104 Viva Drive West, Hudson, Florida.

2. At times material herein, both defendants were personal indorsers and guarantors of delinquent loans at First Federal Savings and Loan Association of Tarpon Springs, by which loans Southfork, the borrower, had financed the construction of the aforementioned houses.

3. At all times material herein, the Department of Housing and Urban Development (hereinafter "HUD") was an executive department of the United States which administered a program, among others, for insuring mortgage loans to qualified purchasers of single family dwellings.

4. At all times material herein, Banco Mortgage Company (hereinafter "Banco") was a lending institution which, from time to time, applied to HUD for insurance on mortgage loans to qualified borrowers.

5. At all times material herein, HUD's aforedescribed program, with exceptions and limitations not pertinent hereto, provided that occupant/mortgagors were permitted to borrow an amount in excess of 95 percent of the appraised value of the property as of the date the mortgage was accepted for insurance, whereas non-occupant/mortgagors were restricted to a smaller amount of financing.

B. **The Scheme to Defraud**

6. From on or about December 23, 1981, through on or about July 8, 1982, at Clearwater and elsewhere, in the Middle District of Florida and elsewhere,

JAMES R. CLODFELTER
and
JAMES A. DeMERITTE,

defendants herein, knowingly and willfully devised and intended to devise a scheme and artifice to defraud the United States by impeding, impairing, obstructing and

defeating HUD in its lawful function of evaluating the ability and intention of borrowers to carry and pay mortgage debt insured by HUD and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, including but not limited to those set forth in Part C hereof, well knowing at the time that said pretenses, representations, and promises would be and were false and fraudulent when made.

C. Manner and Means

7. It was a part of the scheme to defraud that the defendants would and did contract to purchase the aforementioned houses at 102 and 104 Viva Drive West, Hudson, Florida, from Southfork.

8. It was further a part of the scheme to defraud that the defendants would and did apply to Banco for federally insured mortgage financing and thereby would and did induce Banco to apply to HUD for said insurance.

9. It was further a part of the scheme to defraud that the defendants would and did conceal their ownership and control of Southfork by, among other means, executing and using documents which falsely represented the identity of Southfork's officers.

10. It was further a part of the scheme to defraud that the defendants, in submitting Residential Loan Applications to Banco, would and did conceal and cause to be concealed the fact that they were personal indorsers and guarantors of delinquent loans of Southfork, in that, defendant DeMERITTE falsely

stated and represented that he was not an indorser on a note, and defendant CLODFELTER, though stating and representing that he was a co-maker or indorser on a note, failed to provide appropriate explanation as requested.

11. It was further a part of the scheme to defraud that the defendants would and did substantially maximize the amount of financing for which they were eligible by falsely representing that their intent was to occupy the mortgaged properties as their respective residences.

12. It was further a part of the scheme to defraud that the defendants, soon after purchasing the mortgaged properties and retiring Southfork's prior indebtedness thereon, would not and did not occupy said property, but rather would and did sell it, thereby avoiding liability on the mortgages insured by HUD.

D. **The Mailing**

13. On or about March 10, 1982, at Clearwater, in the Middle District of Florida, the defendants,

JAMES R. CLODFELTER
and
JAMES A. DeMERITTE,

for the purpose of executing the aforementioned scheme and artifice to defraud and attempting so to do, knowingly caused to be placed in an authorized depository for mail matter for delivery by the United States Postal Service from Banco to James R. Clodfelter

a document of Banco entitled "Good Faith Estimate of Settlement Services."

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNT TWO

1. Paragraphs 1 through 12 of Count One of this Indictment are realleged and incorporated herein as if fully set forth.

2. On or about March 19, 1982, at Clearwater, in the Middle District of Florida, the defendants,

JAMES R. CLODFELTER
and
JAMES A. DeMERITTE,

for the purpose of executing the aforementioned scheme and artifice to defraud and attempting so to do, knowingly caused to be placed in an authorized depository for mail matter for delivery by the United States Postal Service from Banco to James R. Clodfelter two documents entitled "Contract for Sale and Purchase."

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNT THREE

1. Paragraphs 1 through 12 of Count One of this Indictment are realleged and incorporated herein as if fully set forth.

2. On or about June 3, 1982, at Tarpon Springs, in the Middle District of Florida, the defendants,

JAMES R. CLODFELTER
and
JAMES A. DeMERITTE,

for the purpose of executing the aforementioned scheme and artifice to defraud and attempting so to do, knowingly caused to be placed in an authorized depository for mail matter for delivery by the United States Postal Service from First Federal Savings and Loan Association of Tarpon Springs to James R. Clodfelter a Notice of Dismissal in a civil lawsuit entitled *First Federal Savings and Loan Association of Tarpon Springs vs. Southfork Properties, Inc.; James A. DeMeritte; and James R. Clodfelter.*

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNT FOUR

On or about February 25, 1982, at Clearwater, in the Middle District of Florida, the defendant,

JAMES A. DeMERITTE,

knowingly and willfully and for the purpose of obtaining a loan and advance of credit from Banco Mortgage Company, a corporation, with the intent that said loan and advance of credit be offered to and accepted by the Department of Housing and Urban Development for insurance, and for the purpose of influencing the action

of said Department, did make, pass, utter and publish a statement, that is, a Residential Loan Application, knowing the same to be false, in that said Application contained the statement "No" in response to the question "Are you a co-maker or endorser on a note?", whereas in truth and fact, as the defendant then and there well knew, he was such an endorser.

All in violation of Title 18, United States Code, Section 1010.

COUNT FIVE

On or about May 4, 1982, at Clearwater, in the Middle District of Florida, the defendant,

JAMES R. CLODFELTER,

knowingly and willfully and for the purpose of obtaining a loan and advance of credit from Banco Mortgage Company, a corporation, with the intent that said loan and advance of credit be offered to and accepted by the Department of Housing and Urban Development for insurance, and for the purpose of influencing the action of said Department, did make, pass, utter and publish a statement, that is, Form HUD-92900-1, known as Mortgagee's Application for Mortgagor Approval and Commitment for Mortgage Insurance Under the National Housing Act, knowing the same to be false, in that said Form stated as follows:

(a) In Part 4 of said Form, that the defendant's address was in Clearwater, Florida, whereas, in truth and fact, as the defendant then knew, the defendant's address was in Boca Raton, Florida; and

(b) In Part 7 of said Form, that the defendant would be the "Occupant" of the mortgaged property at 102 Viva Drive West, Hudson, Florida, whereas, in truth and fact, as the defendant then knew, the defendant did not intend to occupy said mortgaged property.

All in violation of Title 18, United States Code, Sections 1010 and 2.

COUNT SIX

On or about May 24, 1982, at Clearwater, in the Middle District of Florida, the defendant,

JAMES R. CLODFELTER,

knowingly and willfully and for the purpose of obtaining a loan and advance of credit from Banco Mortgage Company, a corporation, with the intent that said loan and advance of credit be offered to and accepted by the Department of Housing and Urban Development for insurance, and for the purpose of influencing the action of said Department, did make, pass, utter and publish a statement, that is, a form entitled "Mortgagor's Certification," knowing the same to be false, in that the defendant certified in Paragraph 7 of said form as follows: "That I/we presently occupy or intend to occupy, the subject property as our principal residence except where disclosed differently at application," whereas, in truth and fact, as the defendant then and there well knew, he did not then occupy or intend to occupy the subject property at 102 Viva Drive West, Hudson, Florida, and had not so disclosed at application.

All in violation of Title 18, United States Code, Section 1010.

COUNT SEVEN

On or about May 24, 1982, at Clearwater, in the Middle District of Florida, the defendant,

JAMES R. CLODFELTER,

knowingly and willfully and for the purpose of obtaining a loan and advance of credit from Banco Mortgage Company, a corporation, with the intent that said loan and advance of credit be offered to and accepted by the Department of Housing and Urban Development for insurance, and for the purpose of influencing the action of said Department, did make, pass, utter and publish a statement, knowing the same to be false, in that the defendant, in executing the "Mortgagor's Certificate" contained within Form HUD-92900-4, known as Firm Commitment for Mortgage Insurance Under the National Housing Act, certified in Paragraph (c) thereof that he would live in the property located at 102 Viva Drive West, Hudson, Florida, whereas, in truth and fact, as the defendant then and there well knew, he did not intend to live in said property.

All in violation of Title 18, United States Code, Section 1010.

COUNT EIGHT

On or about May 3, 1982, at Clearwater, in the Middle District of Florida, the defendant,

JAMES A. DeMERITTE,

knowingly and willfully and for the purpose of obtaining a loan and advance of credit from Banco Mortgage Company, a corporation, with the intent that said loan and advance of credit be offered to and accepted by the Department of Housing and Urban Development for insurance, and for the purpose of influencing the action of said Department, did make, pass, utter and publish a statement, that is, Form HUD-92900-1, known as Mortgagee's Application for Mortgagor Approval and Commitment for Mortgage Insurance Under the National Housing Act, knowing the same to be false, in that said Form stated in Part 7 thereof that the defendant would be the "Occupant" of the mortgaged property at 104 Viva Drive West, Hudson, Florida, whereas, in truth and fact, as the defendant then and there well knew, he did not intend to occupy said mortgaged property.

All in violation of Title 18, United States Code, Sections 1010 and 2.

COUNT NINE

On or about May 24, 1982, at Clearwater, in the Middle District of Florida, the defendant,

JAMES A. DeMERITTE,

knowingly and willfully and for the purpose of obtaining a loan and advance of credit from Banco Mortgage Company, a corporation, with the intent that said loan and advance of credit be offered to and accepted by the

Department of Housing and Urban Development for insurance, and for the purpose of influencing the action of said Department, did make, pass, utter and publish a statement, that is, a form entitled "Mortgagor's Certification," knowing the same to be false, in that the defendant certified in Paragraph 7 of said form as follows: "That I/we presently occupy or intend to occupy, the subject property as our principal residence except where disclosed differently at application," whereas, in truth and fact, as the defendant then and there well knew, he did not then occupy or intend to occupy the subject property at 104 Viva Drive West, Hudson, Florida, and had not so disclosed at application.

All in violation of Title 18, United States Code, Section 1010.

COUNT TEN

On or about May 24, 1982, at Clearwater, in the Middle District of Florida, the defendant,

JAMES A. DeMERITTE,

knowingly and willfully and for the purpose of obtaining a loan and advance of credit from Banco Mortgage Company, a corporation, with the intent that said loan and advance of credit be offered to and accepted by the Department of Housing and Urban Development for insurance, and for the purpose of influencing the action of said Department, did make, pass, utter and publish a statement, knowing the same to be false, in that the defendant, in executing the "Mortgagor's Certificate" contained within Form HUD-92900-4, known as Firm

Commitment for Mortgage Insurance Under the National Housing Act, certified in Paragraph (c) thereof that he would live in the property located at 104 Viva Drive West, Hudson, Florida, whereas, in truth and fact, as the defendant then and there well knew, he did not intend to live in said property.

All in violation of Title 18, United States Code, Section 1010.

A TRUE BILL

_____

FOREPERSON

ROBERT W. MERKLE
United States Attorney

By: _____
WARREN A. ZIMMERMAN
Assistant United States Attorney

_____
TERRY A. ZITEK
Assistant United States Attorney
Chief, Criminal Division

[FILED FEB ___ ___]

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 86-6-CR-T-17(A)

JUDGE: KOVACHEVICH

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES R. CLODFELTER,
Defendant.

MOTION TO COMPEL THE DISCLOSURE OF ALL EVIDENCE FAVORABLE TO THE DEFENDANT

COMES NOW the Defendant aforesaid, by his counsel undersigned and moves that this Court enter an Order compelling the government (which when used in this Motion shall include the Department of Justice and any other Department, Commission, arm or agency of the Government) to disclose to the Defendant as in the case of a tangible item, to produce for inspection and copying by the Defendant all evidence in the possession, custody and control of the government, any of its agents, or others, if the existence of that evidence is known to the government, when the evidence may be favorable to the Defendant and material to the issue of guilt or

to punishment or bares upon, and could reasonably weaken or affect any evidence proposed to be introduced against the Defendant by the government, or bares in any material degree on the charge contained in the Indictment, or is relevant to the subject matter of the Indictment, and prosecution, under or in any manner may aid the Defendant in the ascertainment of the truth. The disclosure and production to be made without regard to whether or not the evidence to be disclosed and produced be deemed to be admissible at the trial of this cause. The disclosure and production to include but not limited to the following evidence:

1. The statements, as that term is defined in Title 18, USC Sections 3500(e)(1) and (2), of all persons who have been interviewed by an agent of the government in connection with the subject matter of this cause and who the government presently does not intend to call at trial.

2. The memoranda or summaries of any oral statements made by any person to an agent of the government in connection with the subject matter of this case whether or not:

a) The statement, if in writing, has been signed, adopted or approved by the witness, and

b) The statement relates to the proposed subject matter of direct testimony of the witness at trial.

3. The stenographic, mechanical, electrical or other recording or transcription of it, or an oral statement

made by any person to an agent of the government in connection with the subject matter of the case, and

a) whether or not the stenographic, mechanical electrical or other recording, or a transcription of if is a substantially verbatim recital of the statements, and

b) the statements were recorded contemporaneously with its making, and

c) the statement relates to the proposed subject matter of the direct testimony of witness at trial.

4. The statements of persons or memoranda, summaries or recordings of any oral statement of any person, whether or not the statements were made to the government or an agent thereof.

5. The transcript of the testimony given before the Grand Jury during its investigation and consideration of the subject matter of this cause by persons who:

a) the government intends to call at trial and

b) the government does not intend to call at trial.

6. Any memoranda or any documents or statements of any kind used by the government counsel or agents during their investigation of this cause.

7. The names and addresses of all persons who may have some knowledge of the facts of the present case.

8. The criminal records or any list or summary reflecting the criminal records of all persons the government intends to call at trial.

9. All reports, summaries and memoranda prepared by agents of the government in connection with the investigation of this case.

10. All reports, summaries and memoranda prepared by persons other than the agents of the government in connection with the investigation of this case.

11. Written or recorded statements or any summary or memorandum or any oral statement made by any Defendant or any copies of those statements.

The foregoing Motion is made upon the authority of *Brady v. Maryland,* 373 U.S. 83 (1963), and other legal authorities as set forth in Defendant's Memorandum of Law that accompanies this Motion.

I HEREBY CERTIFY that a copy of the foregoing Motion has been furnished to Warren Zimmerman, Assistant U.S. Attorney, U.S. Courthouse, 611 North Florida Avenue, Tampa, Florida 33602, this 11 day of February, 1986.

/s/ Arnold T. Blostein

ARNOLD T. BLOSTEIN, P.A.
Attorney for Defendant
1700 E. Las Olas Blvd., Ste. 102
Fort Lauderdale, FL 33301
305/764-7000
Florida Bar No. 135385

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 86-6-Cr-T-17(A)

UNITED STATES OF AMERICA

v.

JAMES R. CLODFELTER

REPORT AND ORDER ON OMNIBUS HEARING PROJECT—INSTRUCTIONS

Counsel for the Defendant and the Government shall confer prior to the Omnibus Hearing and shall complete this form as far as possible prior to hearing. If an item numbered below is not applicable to this case, the counsel will note the same in the margin opposite the item number with the letters "N. A." Counsel shall be prepared to argue all pre-trial motions at the Omnibus Hearing except motions to sever Defendant or counts and those motions listed in Paragraph 13.

A. **DISCOVERY BY DEFENDANT** (Circle Appropriate Response)

1. The Defendant states he (has) **(has not)** obtained discovery satisfactory to him at the present time and **(does)** (does not) desire an omnibus hearing.

2. The Government represents that it (has) **(has no)** material evidence favorable to the Defendant on the

issue of guilt. The Government shall disclose all evidence favorable to the Defendant on the issue of guilt, or on matters of impeachment.

3. Defendant requests and moves for discovery pursuant to Rule 16(a)(1), *Fed.R.Crim.P.,* for the following:

(a) Statements of Defendant (Rule 16(a)(1)(A)).

(b) Defendant's prior record (Rule 16(a)(1)(B)).

(c) Documents and tangible objects (Rule 16(a)(1)(C)).

(d) Reports of examination and tests (Rule 16(a)(1)(D)).

Discovery granted under paragraph 3(a) - (d) shall be made available to Counsel for the Defendant on or before Wed., Jan. 29, 1986.

(Granted) (Denied)

_____

UNITED STATES MAGISTRATE

(e) The Government and the Defendant stipulate that they (will) **(will not)** exchange witness lists on or before _____.

So Ordered.

_____

UNITED STATES MAGISTRATE

4. The Defendant moves and requests the following information and the Government states (Circle the appropriate response):

(a) The Government **(may)** (will) (will not) introduce evidence of prior acts or convictions of a similar nature for proof of knowledge or intent. In the event the Government indicates it will or may introduce evidence of prior acts or convictions for proof of knowledge or intent, the Government shall file a list of all such prior acts and convictions within ____ days from _____ or at such other time as the govt may become aware of such acts or convictions.

5. The Government **(may)** (will) (will not) use any prior felony convictions for impeachment of Defendant if he testifies. Any such convictions not listed below shall be provided to the Defendant within ____ days from _____ or at such time as the govt may become aware of such prior convictions.

Date of conviction_____ Offense_____

Date of conviction_____ Offense_____

Date of conviction_____ Offense_____

6. The Government states that there

(a) (has) **(has not)** been any electronic surveillance of the Defendant or his premises;

(b) (has) **(has not)** been any lead obtained by electronic surveillance of Defendant's person or premises; and that

(c) all material uncovered during the course of such surveillance will be supplied to the Magistrate for in camera inspection on _____. The Defendant (moves) (does not move) for production of such material.

(Granted) (Denied) _____
UNITED STATES MAGISTRATE

7. The Defendant moves (circle paragraph indicating the motions):

(a) For a Bill of Particulars.

(Granted) (Denied) _____
UNITED STATES MAGISTRATE

(b) To take deposition(s) of witness(es) pursuant to Rule 15, *Fed.R.Crim.P.* for testimonial purposes and not for discovery.

(Granted) (Denied) _____
UNITED STATES MAGISTRATE

(c) To have a subpoena issued to secure the appearance of the following witnesses (_____) pursuant to Rule 17(b), *Fed.R.Crim.P.*

(Granted) (Denied) _____

UNITED STATES MAGISTRATE

(d) To inquire into the reasonableness of bail.

N.A. Amount- fixed: $_____

(Affirmed) Modified to: $_____

The Defendant shall file a separate motion with memorandum within 15 days, and the Government shall file a responsive memorandum within 10 days after receipt thereof, as to 7(a),(b),(c),(d) above.

_____

UNITED STATES MAGISTRATE

B. DISCOVERY BY THE GOVERNMENT

The following statements are made by the Defendant in response to the Government's request:

8. Competency, Insanity and Diminished Mental Responsibility:

(a) There (is) **(is not)** any claim of incompetency of Defendant to stand trial.

(b) Defendant (will) **(will not)** rely on a defense of insanity at the time of the offense.

(c) Notice of defense of insanity or mental disease or defect shall be provided to the attorney for the Government in writing on

or before _____, pursuant to Rule 12.2(a),(b), *Fed.R.Crim.P.*

So Ordered. _____
UNITED STATES MAGISTRATE

9. Alibi:

(a) The Government demands notice of alibi pursuant to Rule 12.1, *Fed.R.Crim.P.*, and provides the following information:

_____

_____

_____

(b) Upon written demand by the Government, the Defendant shall file written notice of alibi on or before _____ pursuant to Rule 12.1(a), and such notice shall provide all information as directed by rule 12.1(a) *Fed.R.Crim.P.*

So Ordered. _____
UNITED STATES MAGISTRATE

10. Nature of the defense:

(a) Defendant states that his defense includes (circle appropriate response):

1. Lack of knowledge of contraband.
2. Alibi.
3. Diminished mental responsibility.

4. Entrapment.
5. Self-defense.
6. General denial.

11. The Government moves for reciprocal discovery pursuant to Rule 16(b)(1), *Fed.R.Crim.P.*, for the following:

(a) Documents and tangible objects (Rule 16(b)(1)(A)).

(b) Reports of examination and tests. (Rule 16(b)(1)(B)).

Discovery Granted under Paragraph 11(a) and (b) shall be made available to counsel for the Government by the Defendant on or before _____.

So Ordered. _____
UNITED STATES MAGISTRATE

12. The Government moves (circle paragraph) that the Defendant:

(a) Appear in line-up.

(Granted) (Denied) _____
UNITED STATES MAGISTRATE

(b) Speak for voice identification by witness.

(Granted) (Denied) _____
UNITED STATES MAGISTRATE

(c) Be fingerprinted.

(Granted) (Denied) _____
UNITED STATES MAGISTRATE

(d) Pose for Photographs (not involving a reenactment of the crime).

(Granted) (Denied) _____
UNITED STATES MAGISTRATE

(e) Try on article of clothing.

(Granted) (Denied) _____
UNITED STATES MAGISTRATE

(f) Surrender clothing or shoes for experimental comparison.

(Granted) (Denied) _____
UNITED STATES MAGISTRATE

(g) Permit the taking of specimens or materials under fingernails.

(Granted) (Denied) _____
UNITED STATES MAGISTRATE

(h) Permit the taking of samples of blood, hair and other materials of his body which involve no unreasonable intrusion.

(Granted) (Denied) _____
UNITED STATES MAGISTRATE

(i) Provide samples of his handwriting.

(Granted) (Denied) _____
UNITED STATES MAGISTRATE

(j) Submit to a physical external inspection of his body.

(Granted) (Denied) _____
UNITED STATES MAGISTRATE

C. MOTIONS REQUIRING A SEPARATE HEARING BEFORE DISTRICT JUDGE

13. The defendant **(may)** (has) (will) file a motion—(circle subparagraph showing motion requested):

(a) To suppress physical evidence in the Government's possession on the ground(s) of (Circle appropriate response):

(1) Illegal search and seizure.
(2) Illegal arrest.

(b) To suppress admissions or confessions made by Defendant on the ground(s) of (Circle appropriate subparagraph):

(1) Unreasonable delay in appearance before Magistrate.
(2) Coercion or unlawful inducement.
(3) Violation of *Miranda*.
(4) Unlawful arrest.

(c) To dismiss for failure of the indictment or information to state an offense.

(d) To dismiss the indictment or information, or count(s) _____ thereof, on grounds of duplicity.

(e) To dismiss for denial of a speedy trial.

(f) To sever case of Defendant DeMerritte and for a separate trial.

(g) To sever count(s) _____ of the indictment or information and for separate trial thereon.

Defendant will file a formal motion to suppress or dismiss, or both, accompanied by a memorandum brief within ____ days after the Omnibus Hearing. The Government will file a responsive memorandum brief within ____ days after receipt of Defendant's brief.

D. STATUS OF CASE

14. Defendant's counsel states that (Circle appropriate response and complete blanks):

(a) As of date indicated below, he (does) **(does not)** know of any problems involving delay in arraignment, *Miranda*, illegal search and seizure or arrest, or any other constitutional problem, except as set forth above.

(b) He has inspected this form and (does) **(does not)** know of any motion or matter that Defendant desires to present to the Court, other than those indicated on this form.

(c) There (is) **(is not)** a probability of a disposition of this case without a trial.

(d) Defendant (will) **(will not)** waive a jury.

(e) Defendant will be ready for trial on and after unknown.

(f) Defendant estimates that the trial will last unknown hours _____ days.

15. The Government states that (Circle appropriate response and complete blanks where appropriate):

(a) The Government will be ready for trial on and after 3/14/86.

(b) The Government estimates that the trial will last 7 to 8 days hours _____ days.

(If the parties conclude that no motions will be urged and that an omnibus hearing is not desired, they shall complete and sign this form (where indicated below) and submit it to the Court not later than five (5) days prior to the date set for the Omnibus Hearing, in which event no hearing will be held unless otherwise directed by the Court.)

In the event either the Defendant or the Government does not comply with the terms of this Order, the complaining party shall file a Motion to Compel compliance within three (3) days after time fixed in this Order for compliance.

APPROVED: DATED: _____

_____
Attorney for the
United States

_____
Attorney for
Defendant

So Ordered. _____
UNITED STATES
MAGISTRATE

_____
Defendant

_____
UNITED STATES
DISTRICT
JUDGE

[FILED 1986 SEP 19]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 86-6-CR-T-17

UNITED STATES OF AMERICA

vs.

JAMES R. CLODFELTER

JUDGMENT OF ACQUITTAL

This cause came on for trial before the Court and a jury, Honorable ELIZABETH A. KOVACHEVICH, United States District Judge, presiding and the issues having been duly tried and the jury duly rendered its verdict of NOT GUILTY as to Count(s) 1, 2, 3 & 5, of the indictment, it is thereupon,

ORDERED AND ADJUDGED that the defendant JAMES R. CLODFELTER, is NOT GUILTY of the offense as charged in Count(s) 1, 2, 3 & 5, of the indictment in this cause.

DONE AND ORDERED at Tampa, Florida, this 19th day of September, 1986.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
UNITED STATES
DISTRICT JUDGE

United States District Court for
MIDDLE DISTRICT OF FLORIDA –
TAMPA DIVISION

DOCKET NO 86-6-CR-T-17

United States of America

vs.

JAMES R. CLODFELTER
3803 N.W. 7th Place, Deerfield Beach, FL 33442

Defendant

**JUDGMENT AND PROBATION/
COMMITMENT ORDER**

In the presence of the attorney for the government the defendant appeared in person on this date 01 23 87

COUNSEL

WITH COUNSEL Arnold Blostein

PLEA

NOT GUILTY

FINDING & JUDGMENT

There being a verdict of GUILTY. Defendant has been convicted as charged of the offense(s) of False

statements in loan application in violation of Title 18, USC, Section 1010, as charged in counts 6 & 7.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS as to count 6. Execution of all of the same, except SIX (6) MONTHS, is suspended and the defendant is placed on probation for a period of THREE (3) YEARS under the standing conditions of probation. Defendant is to pay a fine in the amount of $2,500.00. Imposition of a sentence of imprisonment is suspended as to count 7, and the defendant is placed on probation for a period of TWO (2) YEARS under the standing conditions of probation. Counts 6 and 7 are to run consecutive. This Court will entertain a motion for early termination of probation.

ADDITIONAL CONDITIONS OF PROBATION

Offense committed prior to 1/1/85. In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of the judgment be imposed. The Court may change the conditions of probation, reduce, or extend the period of probation and at any time during the probation period or within a maximum

probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

U.S. District Judge ELIZABETH A. KOVACHEVICH Date 1/23/87

[M'FILM ROLL #92]

[DOCUMENT #1465 148]

[FILED 1986 SEP 23]

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 86-6-CR-T-17(A)

JUDGE: KOVACHEVICH

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES R. CLODFELTER.
Defendant.

MOTION FOR NEW TRIAL

COMES NOW the Defendant, CLOODFELTER, by and through his undersigned attorney, and moves this Honorable Court for a new trial, pursuant to F.R.C.P. Rule 33, and as grounds would show:

1. That the evidence adduced at trial was insufficient to sustain verdicts of guilty as to Counts Six and Seven of the indictment in that said verdicts are against the weight of the evidence and that said verdicts constitute a miscarraige of justice.

2. That the evidence is insufficient to establish defendant's guilt beyond a reasonable doubt in that the evidence is not inconsistent with every reasonable

hypothesis of the Defendant's innocence, and that the Government's case is based almost entirely on circumstancial evidence.

3. That the Government failed to prove the jurisdictional elements of the offenses charged in Counts Six and Seven beyond a reasonable doubt; and further failed to prove that the alleged "False statements" of defendant were material.

4. That the jury verdicts were inconsistent in that the evidence and proof necessary to sustain convictions on Counts Six and Seven was the same as the evidence and proof regarding Count Five, or which he was acquitted, because said Count Five, under the Government's own trial theory required exactly the same acts as the Counts on which he was convicted, i.e. that defendant willfully and knowingly made the false representation that he would occupy the home which he was purchasing.

5. That the document which was the subject of Count Six of the indictment, specifically paragraph seven of said Mortgagor's Certification, contains the wording "except where disclosed differently at application." That the government totally failed to introduce any evidence as to what was disclosed specifically at application; and in fact the government put on testimony that the application which was originally submitted on March 1, 1982, was changed and amended in April, 1982 to reflect that the defendant would become an owner-occupier, and further introduced evidence that the real estate contract was changed with respect to the mortgage financing in that said financing

was increased to 95% in accordance with owner-occupant guidelines. The Government further placed into evidence the original contract, which specifically inferred the fact that Defendant would not be an owner occupant and was not seeking owner-occupant, or 95%, financing.

6. That the Government, in its theory of the case, and by 99% of its evidence, attempted to prove a "scheme to defraud" in accordance with Title 18, Section 1001, and thus should have charged defendant with a violation or violations of that section, rather than section 1010.

7. That at the time of the execution of the documents alleged in Counts Six and Seven of the Indictment, the loan had already been offered to, and accepted by FHA, or HUD, for insurance, based on Defendant's prior representations and the Firm Committment which given to Defendant on May 7, 1982 to continue in force until September of 1982. That in view of the above, any further statements or representations given by Defendant at closing on May 24, 1982 were surplusage and would not be material as required by the Statute and the Court's instructions to the jury.

8. That when it was brought to the Court's attention that juror #7, Mr. Herndon, was asleep during Defendant's direct examination, that the Court failed to make adequate investigation to determine whether or not the juror had been sleeping during the course of Defendant's testimony as he did at other times during the trial. The Court further failed to excuse Juror #2

when a member of her immediate family was undergoing surgery on the day that Defendant presented his entire case; and instead adjourned Court at 3:00 P.M. Thursday, September 11, 1986 until Monday, September 15, 1986.

9. That when the counsel for Defendant brought to the Court's attention that unauthorized exhibits not admitted into evidence were in the jury's possession in the jury room during deliberations, and moved for a mistrial; the Court denied Defendant's motion, and further failed to make direct inquiry of each individual juror as to whether that juror had examined or seen said exhibits, especially since one guilty verdict was directly related to one of the exhibits.

10. That the remarks of the prosector during closing argument were improper and prejudiced Defendant, in that the prosecutor made reference to former codefendant, DeMeritte, stating that he had done the exact same things Defendant was accused of in the elaborate scheme set forth by the Government; and just before closing commented on the fact that it was quite an unbelievable coincidence that codefendant DeMeritte had done the exact same things that Defendant Clodfelter was accused of, thus making Defendant Clodfelter's testimony "incredible beyond belief."

11. That further it was improper for the jury to have individual copies of the indictment which jointly charged the Defendant Clodfelter and the codefendant DeMeritte; and in view of the Government's references to DeMeritte and the copies of the indictment, the Defendant was unjustly prejudiced by the "Spillover"

efect of the alleged single scheme, the volume and manner of the presentation of the evidence, and the possibility that the jury could easily have transferred the guilt from one alleged coschemer to another.

WHEREFORE, Defendant moves this Honorable Court to grant a new trial with respect to the guilty verdicts returned as to Counts Six and Seven of the indictment.

I HEREBY CERTIFY that a copy of the foregoing was furnished to Warren A. Zimmerman, Assistant United States Attorney, by hand delivery this 23rd day of September, 1986.

/s/ Arnold T. Blostein

ARNOLD T. BLOSTEIN, P.A.
Attorney for Defendant Clodfelter
1700 E. Las Olas Blvd., Ste 102
Fort Lauderdale, Florida 33301
305/764-7000
Florida Bar No. 135385

DENIED AND SO ORDERED this 17th day of October 1986

/s/ Elizabeth A. Kovachevich

Elizabeth A. Kovachevich
U.S. District Judge

[FILED _____ DEC 29]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 86-6-CR-T-17(A)

UNITED STATES OF AMERICA

V.

JAMES R. CLODFELTER.

MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL

The defendant, JAMES R. CLODFELTER, contends that this Honorable Court should grant a new trial on the basis that the Government withheld important testimony and information in its possession contrary to the ruling in *BRADY v. MARYLAND,* 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194 (1963).

The *BRADY* doctrine stands for the proposition that the "suppression of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."

A defendant seeking to show a breach of the *BRADY* doctrine warranting a new trial or a reversal of his conviction must establish three facts:

1. That the prosecution suppressed evidence;

2. that the evidence bore favorably on the Defendant's defense; and

3. that the evidence was material to the question of guilt or innocence. *U.S. v. KOPITUK*, 690 F2d 1289, 1339 (Fifth Circuit 1982) and *MOORE v. ILLINOIS*, 408 US 786, 794-5, 92 S Ct 2562, 2567-8, 33 L Ed 2d 706 (1972).

The Defendant's theory of the case is as follows:

The Defendant purchased one of two homes built by Southfork Properties, Inc., a corporation in which he owned a 50% interest with a James DeMeritte. It was originally decided in December, 1981 that the Defendant would purchase one home, and DeMeritte the other—basically allowing for the liquidation of the corporation. The original contracts called for an 80% or non-owner occupied loan.

In February of 1982, the Defendant Clodfelter and his wife decided to dissolve their marriage, and the Defendant also decided to dissolve his law partnership with John Bonner, the Defendant's father-in-law. A contract to purchase the home was submitted to Banco Mortgage Corporation approximately 3/1/82. Prior to this time, the Defendant had formed his own Professional Association to open his own law practice and had moved out of the home at 2162 Waterside Drive in Clearwater, Florida, which he had shared with his wife. Defendant later entered into a property settlement agreement whereby his wife would retain all right, title

and interest in that home and all of the furnishings therein, upon dissolution of their marriage in July of 1982.

Upon moving from the home on Waterside Drive, and prior to submitting the FHA loan papers, Defendant moved into a fully furnished, rented townhome in Indian Rocks Beach, Florida, occupied by a friend by the name of Robert Vanderbrink. The premesis had been leased by Vanderbrink until June 1, 1982; when he was to move into another residence with his fiancee. Defendant thus had a rent-free townhome to occupy until June 1, 1982, the anticipated time of the closing on his home.

Furthermore, on 3/4/82, Defendant accepted part time employment with the International Gold Bullion Exchange in Fort Lauderdale, Florida at the rate of $1,000.00 per week. Initially, Defendant did not have an office or a secretary in Fort Lauderdale, and he commuted back and forth from the West coast to the East coast when business necessiatated. While he was receiving compensation for the part time work he was performing for the Fort Lauderdale company, Defendant was winding up the cases he was working on for his old law firm and also working on his own law practice in the Pinellas/Pasco area.

When it became evident that the Defendant and his wife were not going to reconcile, and that he would need a home to live in when he was practicing law on the West coast, Defendant changed his contract from non-owner occupied to owner occupied with regard to the financing that he would be seeking. In accordance with his intentions, at the end of April, 1982, the Defendant

purchased a complete set of furniture for the home he was buying, and placed it in storage for delivery at the end of May, 1982, when the lease on the furnished Indian Rocks Beach townhome was to expire, and after the new home would be transferred to his name from Southfork Properties.

On or about May 1, 1982, defendant signed an agreement to rent a fully furnished home on the East coast in Boca Raton, for which his employer had agreed to pay the rent in lieu of paying for the Defendant's hotel bills when he was in the area on company business. The rental on this furnished home was the equivalent of 4 to 5 days stay at the hotel where out-of-town employees were put up by the company; and since the Fort Laduerdale employment called for Defendant to be on the East coast at least 4 to 5 days a month, the rental on the furnished home was cost effective for the Defendant's employer.

On May 1, 1982 Defendant vacated his old law firm address at 613 S. Myrtle and moved into his new office at 300 Turner Street in Clearwater, Florida; taking all of his office furniture, files and personal belongings to the new address. Immediately thereafter, he had telephone lines installed and stationary and business cards printed (at a substantial cost), since he intended to spend one-half of his time in the private practice of law on the West coast. On May 24, 1982, Defendant returned from a week long business trip and attended the closing on his new home. It was at this closing that the Defendant signed the two FHA forms indicating his intent to occupy the home, which were the basis for the convictions for signing a false statement to induce a

FHA or HUD insured loan. At that time, it was indeed the Defendant's intention to occupy the home; and he had made plans to move his personal belongings from the Indian Rocks Beach townhome, and to have his newly purchased furniture delivered to the new home so he could occupy it.

Upon returning to Fort Lauderdale the day of his closing, the Defendant was informed that his services were needed in Fort Lauderdale on a full time basis, and that he would have to give up his private practice on the West Coast and relocate to the Fort Lauderdale area full time. It was agreed that Defendant would be given a substantial raise, an expense allowance, and a company credit card for his personal and business use; and Defendant's employer would also purchase the Defendant's new home as part of his relocation package. All of these discussions and agreements took place before the Defendant returned to the West coast after the May 24, 1982 closing, before he returned to move from the Indian Rocks Beach residence and before he could occupy the new home.

After his agreement to move to the East coast on a full time basis, Defendant then returned to the West coast on several occasions during June and July of 1982 to gather his personal belongings and to close his law practice there by transferring his files and clients to Attorney Douglas Menchise. This was substantially accomplished by July 3, 1982, when Defendant had all of his belongings and the new furniture he purchased for the new home transported by moving van to the furnished residence he had rented in Boca Raton. Upon his relocation to the Fort Lauderdale area, and the

closing by Defendant's employer on the Defendant's home on July 8, 1982; Defendant changed from a part time to a full time employment status, and pursuant to his relocation and salary arrangement, Defendant began paying his own rent on the home in which he was staying in Boca Raton.

It is the Defendant's contention and theory of defense that as of the date of his closing on May 24, 1982, his intent was definitely to occupy the new home. This intent changed only after the critical events that occurred the few days after the May 24, 1982 closing which led to the Defendant's change from part time employment with his own private law practice on the West coast, to full time employment without his private practice on the East coast.

The Defendant contends that the Brady violation occurred when the Government withheld favorable, material evidence reflecting on the Defendant's innocence, which evidence concerned the Defendant's employment status, the events surrounding the purchase of his home by his employer, and his intention to occupy and subsequently not to occupy—the home he had just purchased. This evidence consisted of Grand Jury testimony of Alfred Giamanco bearing the dates of December 18, 1984 and January 15, 1985. Existence of the exculpatory nature of this testimony was first disclosed to the Defendant in the Government's sentencing memorandum filed October 1, 1986, where the Government states on page 2 of said memorandum, that Giamanco's testimony:

"was generally consistent with the defendant's own testimony at trial, *i.e.*, Giamanco stated that he formed L.D. at the behest of the late William Alderdice in order to purchase two homes belonging to the defendant as a result of a change in the defendant's employment status."

Defendant, by and through counsel; and counsel hereby both state unequivocably and with certainty that the Government did not provide any statements, transcripts, or parts of statements or transcripts of Giamanco to the defense until November 17, 1986, at Defendant's sentencing hearing.

The government may maintain that the prosecutor thought that the Giamanco transcripts were tendered during the trial of the case in September, 1986, at the same time that the Government tendered the transcript of the Grand Jury testimony of the Defendant's ex-wife, Janice Case; however, the Defendant and the undersigned counsel would represent to this Honorable Court that the first time either of them had seen the Giamanco transcripts, or been advised of their content, was at said sentencing hearing.

As indication of the Government's intent and failure to tender these important transcripts, the Government also stated during the proceedings of June 17, 1986 (Tr. 6/17/86, pg. 7) that Giamanco was, in AUSA Zimmerman's words "just my view, he's a non-essential witness and his absence presents neither a speedy trial nor due process problem for Mr. Clodfelter." At this hearing, the Defendant argued the necessity of

Giamanco's presence (Tr. 6/17/86, pg. 9) as being the only witness, other than the deceased William Alderdice, who was material to the points raised in the defense. The defense obviously had no knowledge that any other persons were in the room at the times or during the meetings described by Giamanco during his testimony, especially John Compton and Wayne Hamby.

Contained in the Giamanco transcripts were certain statements regarding the decision to form L.D. Investments, the corporation which purchased Defendant's home (G.J. Tr. 12/18/84, Giamanco, ppg. 5,6,11,13 & 14); the change in Defendant's status from part time to full time (G.J. Tr. 12/18/84 Giamanco, ppg. 8, 9, 11, 14 & 15); the decision to purchase the Defendant's home as part of his relocation (G.J. Tr. 12/18/84, Giamanco, ppg. 8, 9, 11 & 14); and the names of persons unknown to the Defendant who was present and a part of those decisions (G.J. Tr. 12/18/84, Giamanco, ppg. 5, 7 & 8).

While known to, and in possession of, the Government, this information was unknown to the Defendant at the time of trial; and the circumstances surrounding the aforementioned events were unknown to, and not in possession of, the Defense at trial. The Defendant was also not present when the events described by Giamanco occurred, and thus would have had no personal knowledge of same. (G. J. Tr. 12/18/84, Giamanco, pg. 9).

During the direct examination of the Defendant (Tr. 9/11/86, pg. 66), the Defendant testified that his original agreement with his employer was to work on a part time

basis, and to retain all of his private clients and to operate his law office in Clearwater as he pleased. The Defendant further testified about the chain of events regarding his employment status, which occurred immediately after the 5/24/82 closing (Tr. 9/11/86, ppg. 70-71), which led to his full time employment with IGBE, and his change of intention to occupy the new home he had just purchased.

Giamanco's testimony G.J. Tr. 12/18/84, ppg. 5-9) indicates the presence of persons other than Giamanco and Alderdice during the meetings in which the decisions were made to purchase the Defendant's home and relocate him to Fort Lauderdale on a full time basis. These persons were John Compton, Wayne Hamby and Danos Kavos, all or part of whom were supposedly part of the decision to purchase Defendant's property and form L.D. Investments, so that the Defendant could move to Fort Lauderdale as a full time employee. Defendant had no idea that these persons were present, and had no knowledge of same until that was disclosed by Giamanco's Grand Jury testimony.

Since receiving the Giamanco transcripts, Defendant has been able to locate, with great difficulty, John Compton, and his affidavit regarding the above is attached hereto and made a part hereof as "exhibit A". Mr. Compton further provided information regarding other witnesses who may have additional material, exculpatory testimony for Defendant's behalf.

Under *BRADY,* when the prosecutor has not disclosed information, the standard of materiality is whether there was any reasonable likelihood that the

suppressed evidence might have affected the outcome of the trial. *U.S. v. PHILLIPS,* 664 F2d 971, 1025 (Fifth Circuit, 1981) and *U.S. v. AGURS* 427 US 97, 104; 96 S. Ct. 2392, 2397; 49 L Ed 2d 342 (1976). The testimony of Alfred Giamanco and John Compton would be both material and exculpatory; and would fall under the *BRADY* decision and all subsequent related cases.

The only evidence offered by the Government as to Defendant's employment status and intent to occupy was during the testimony of Shiela Chene (Tr. 9/9/86, p. 115) where Chene testified that she could not recall whether the Defendant was a part time employee at IGBE: and the only other relevant evidence other than the testimony of the Defendant, was that of Joan Ignelzi, the bookkeeper for IGBE, when she stated that the Defendant was not around the office in Fort Lauderdale much for a few months after starting employment (Tr. 9/10/86, pg. 117); and when she testified that a $1,000.00 a week wage could be consistent with full time employment (tr. 9/10/86, ppg. 108-109).

As is set forth in Giamanco's transcripts, there were other persons with knowledge of the events leading to the Defendant's change of employment status and his eventual move to the East coast on a full time basis. This information, withheld by the prosecution, would clearly have given the Defendant a witness or witnesses to corroborate his testimony; and most importantly, would have reflected the Defendant's intent to occupy the home, and the reason that he did not. The Defendant maintains that this additional testimony would have affected the outcome of the trial, and would have created a reasonable doubt as to the guilt of the Defendant.

The *BRADY* rule is based on the requirement of *due process.* Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. The SUPREME COURT has recognized that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignity . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *BERGER v. U.S.,* 295 US 78, 88; 79 L Ed 1314; 55 S Ct 629 (1935), and *BRADY v. MARYLAND,* 373 US at 87-88.

If the Government did not feel that any of the information or statements contained in the Giamanco transcripts was exculpatory or helpful to the defense, then the Defendant could only guess as to what other exculpatory or impeachment materials, statements or evidence exist in the Government's files that the Government has withheld or refused to disclose despite the repeated requests of the Defendant or its obligation under the law. Regardless, the Defendant was denied *DUE PROCESS* and a fair trial because of the suppression. The *BRADY* material withheld by the Government was exculpatory, material evidence favorable to the Defendant, that, if disclosed and used effectively, may have made the difference between conviction and acquital.

The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. It is upon such subtle factors as the possible interest of the witness in testifying that a defendant's life or liberty may depend; and any

additional testimony or evidence taken along with the testimony of the Defendant, which was characterized as self-serving by the Government, would have created a reasonable doubt as to the Defendant's intent or guilt. The evidence and statements in the Giamanco transcripts were obviously both exculpatory and material, and corroborated the Defendant's testimony at trial, as admitted by the Government in its SENTENCING MEMORANDUM. If disclosed, this corroboration could have, in all reasonable probability, resulted in a different verdict at the trial.

The circumstances in the present case fall under the standard set forth in *BRADY* and *AGURS,* as a situation where the Government failed to disclose evidence despite a *BRADY* request. The Court in *AGURS* noted that "a fair analysis of the holding in *BRADY* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." This defines the term "materiality" for purposes of the circumstances surrounding the present case, and thereby determines that the statements and evidence offered in Giamanco's transcripts were material to the defense because that evidence *might* have affected the outcome of the trial.

An incomplete response to a *BRADY* request not only deprives the defense of certain evidence, but has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued. *U.S. v. BAGLEY,*

87 L Ed 2d 481, 494. The COURT further noted that the prosecutor's failure to respond fully to a *BRADY* request may impair the adversary process in this manner; and the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of that assumption.

Moreover, the existence of any small piece of evidence favorable to the defense may, in a particular case, create just the doubt that prevents the jury from returning a verdict of guilty. When the Government does not disclose information in its possession that might reasonably be considered favorable to the defense, it precludes the trier of fact from gaining access to such information and thereby undermines the reliability of the verdict. Evidence that is of doubtful worth in the eyes of the prosecutor could be of inestimable value to the defense, and might make the difference to the trier of fact. *U.S. v. BAGLEY,* 87 L Ed 2d 481, 501, 504 (1985).

It has long been recognized that the Government's concern for a fair verdict precludes it from withholding from the defense evidence favorable to the defendant's case that is in the prosecutor's files. *PYLE v. KANSAS* 317 US 213, 215-216; 87 L Ed 214; 63 S Ct 177 (1942). The COURT in *BRADY* further enunciated that the correct constitutional rule for materiality was not whether the jury would ultimately credit the evidence at issue, but whether the evidence was *substantial,* and as such the State's failure to disclose it cannot "be held as a matter of law to be unimportant to the defense

here." citing *U.S.ex rel. THOMPSON v.DYE,* 221 F 2d 763 (1955). The Giamanco testimony obviously was germane and material to the points at issue in the trial, and thus falls under the *BRADY* doctrine.

The *Due Process* clause is violated when favorable evidence is not turned over upon request and "the evidence is material either to guilt or punishment." *BRADY* at 87, *AGURS* at 112. The suppressed evidence in the present case was not only favorable to the Defendant Clodfelter, but was also unquestionably material as to the issue of his guilt or innocence; and it not only might have affected the outcome of the trial, but would have affected the outcome of said trial.

Respectfully submitted,

/s/ Arnold T. Blostein

ARNOLD T. BLOSTEIN, P.A.
Attorney for Defendant Clodfelter
1700 E. Las Olas Blvd., Ste. 202
Fort Lauderdale, Florida 33301
305/764-7000
Florida Bar no. 135385

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Memorandum of Law was furnished by courier to Warren A. Zimmerman, Esquire, Assistant U.S. Attorney, this 29th day of December, 1986.

ARNOLD T. BLOSTEIN, P.A.
Attorney for Defendant
Florida Bar 135385
1700 East Las Olas Boulevard
Suite 202
Fort Lauderdale, Florida 33301
Tel. No. 764-7000/764-2700

By /s/ Arnold T. Blostein
ARNOLD T. BLOSTEIN, ESQUIRE

STATE OF FLORIDA

COUNTY OF DADE

AFFIDAVIT

I, JON COMPTON, being first duly cautioned and sworn, deposes and says:

1. That I was present in William Alderdice's office at the International Gold Bullion Exchange, in Fort Lauderdale, Florida, at the end of May, 1982. Also present were Alfred Giamanco, William Alderdice, Wayne Hamby and possibly one or two other individuals whose names I do not remember.

2. At this metting there was a discussion of the purchase of real estate on the west coast of Florida belonging to Jim Clodfelter.

3. I knew Jim Clodfelter was a part time employee at International Gold Bullion at that time as most of my contract with him up to that time in his law office at Clearwater, Florida.

4. The reason for the purchase of this property on the west coast of Florida was as part of the agreement to make him a full time employee at IGBE, and for him to relocate to the Fort Lauderdale area.

5. At this meeting in Alderdice's office, discussions were had about forming a corporation to purchase the property and also about me having an ownership

interest in the corporation that was going to be set up to purchase this property and other real estate.

6. That a short time prior to this meeting, I was present at the same location with Alderdice and his chief assistant, Micheal Zamborous, when a decision was made to make Clodfelter a full time employee and get him to live in the Fort Lauderdale area full time.

7. That I was also present when Alfred Giamanco was told to form the corporation which was known as L.D. Investments.

8. To the best of my knowledge, Jim Clodfelter was not present at any of the meetings I mentioned above.

FURTHER AFFIANT SAYETH NOT.

Dated December 26, 1986.

/s/ Jon Compton
JON COMPTON

Personally appeared before me, and known to me, the above affiant, Jon Compton swore to the truth of the foregoing and subscribed same this 29th day of December, 1986.

/s/ Susan Robertson
NOTARY PUBLIC

My commission expires:

NOTARY PUBLIC, STATE OF FLORIDA
MY COMMISSION EXPIRES APRIL 15, 1990.
BONDED THRU NOTARY PUBLIC UNDERWRITERS

[FILED JAN 14 '87]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 86-6-Cr-T-17(A)

UNITED STATES OF AMERICA

v.

JAMES R. CLODFELTER

ORDER

The Court has for its consideration defendant Clodfelter's second Motion for New Trial;

This Court has considered defendant Clodfelter's Memoranda in support thereof (including but not limited to the affidavit of Jon Compton), the government's Response thereto (including but not limited to the transcript of Alfred Giamanco's grand jury testimony of December 18, 1984) and the government's Supplemental Filing relating to the transcripts of witnesses Giamanco and Headley, and has heard oral argument in the matter, and is otherwise sufficiently advised in the premises;

Upon due consideration, it is hereby the finding of this Court that there is no reasonable probability that the result of the trial in this case would have been affected by pretrial disclosure of the aforementioned

transcript of Alfred Giamanco. For the reasons set forth in Paragraphs 3 through 7 of the Government's Response to Defendant's Second Motion for New Trial and the Memorandum of Law submitted therewith, save those reasons relating to disclosure of the transcript, this Court specifically finds that the transcript was not material within the meaning of *United States v. Bagley,* 87 L.Ed.2d 481 (1985);

THEREFORE, it is hereby ORDERED and ADJUDGED as follows:

That defendant Clodfelter's second Motion for New Trial be and the same is hereby denied.

So Ordered.

DONE and ORDERED in Chambers this 14th day of January, 1987, at Tampa, Florida.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to Counsel of Record

[FILED JAN 23 '87]

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 86-6-CR-T-17(A)

JUDGE: KOVACHEVICH

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES R. CLODFELTER,
Defendant.

MOTION FOR RE-HEARING

COMES NOW the Defendant, JAMES R. CLODFELTER, by and through his undersigned attorney and moves this Honorable Court for a re-hearing on defendant's Motion For New Trial and as grounds therefore would show:

1. That the defendant was unable to be present at the argument on Defendant's Motion For New Trial and wishes to testify before this Court regarding the material contained therein.

Respectfully submitted,

/s/ Arnold T. Blostein
ARNOLD T. BLOSTEIN, P.A.

I HEREBY CERTIFY that a copy of the foregoing Motion has been furnished by hand to Warren Zimmerman, Assistant U.S. Attorney, U.S. Courthouse, 611 North Florida Avenue, Tampa, Florida 33602, this 23rd day of January, 1987.

/s/ Arnold T. Blostein

ARNOLD T. BLOSTEIN, P.A.
Attorney for Defendant
1700 E. Las Olas Blvd., Ste. 202
Fort Lauderdale, Florida 33301
305/764-7000
Florida Bar No. 135385

[GRANTED AND SO ORDERED this 23RD day of JANUARY 1987.]

[FILED 1987 JAN 29]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 86-6-Cr-T-17(A)

UNITED STATES OF AMERICA

v.

JAMES R. CLODFELTER

ORDER

This cause came on for consideration on January 23, 1987, on defendant's Clodfelter Motion for Rehearing of this Court's denial of the defendant's second Motion for New Trial.

This Court has considered the defendant's Motion for Rehearing, together with the testimony of the defendant and Robert Van den Brink, in the light of all memoranda, affidavits, and exhibits previously filed.

Upon due consideration, this Court hereby finds that nondisclosure of the grand jury testimony of Alfred Giamanco does not undermine confidence in the outcome of this case. This Court further reaffirms its finding that there is no reasonable probability that pretrial disclosure of the Giamanco testimony would have affected the outcome of the proceeding. The

transcript was thus not material within the meaning of *United States v. Bagley,* 87 L.Ed. 2d 481 (1985).

The defendant's presentation of the testimony of Robert Van den Brink is treated as a motion for new trial based on newly discovered evidence. Sufficient facts have neither been alleged nor proven from which this Court may infer the defendant's diligence in seeking out Mr. Van den Brink before trial. It is the further finding of this Court that Mr. Van den Brink's testimony would not likely produce an acquittal at a new trial. Therefore, a new trial is not warranted on the basis of his testimony.

THEREFORE, it is hereby ORDERED and ADJUDGED as follows:

That the defendant's second Motion for New Trial be and the same is hereby denied on rehearing in all respects.

So Ordered.

DONE and ORDERED this 29th day of January, 1987, at Tampa, Florida, and effective January 23, 1987, *nunc pro tunc.*

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to: Counsel of Record

[FILED IN OPEN COURT JAN 23 1986]

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 86-6-CR-T-17(A)

JUDGE: KOVACHEVICH

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES R. CLODFELTER,
Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY given that JAMES R. CLODFELTER, Defendant named herein above, appeals to the United States Court of Appeals for the Eleventh Circuit, for his conviction on the 16th day of September, 1986 and his sentence on the 23rd day of January, 1987.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion has been furnished by hand to Warren Zimmerman, Assistant U.S. Attorney, U.S. Courthouse, 611 North Florida Avenue, Tampa, Florida 33602, this 23rd day of January, 1987.

/s/ Arnold T. Blostein

ARNOLD T. BLOSTEIN, P.A.
Attorney for Defendant
1700 E. Las Olas Blvd., Ste. 202
Fort Lauderdale, Florida 33301
305/764-7000
Florida Bar No. 135385

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-3086
Non-Argument Calendar

D.C. Docket No. 86-6

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES R. CLODFELTER,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(October 9, 1987)

Before TJOFLAT, HILL and FAY, Circuit Judges.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1

Judgment Entered: October 9, 1987
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: November 5, 1987

[FILED NOV 25 1987]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-3086

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES R. CLODFELTER,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Appellant's motion to withdraw mandate is GRANTED.

Appellant's motion to file Petition for Rehearing out of time is GRANTED.

/s/ GERALD B. TJOFLAT
UNITED STATES
CIRCUIT JUDGE